# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STEPHEN L. CROCKER and DEBRA L. CROCKER, husband and wife,<br><br>Appellants,<br><br>v.<br><br>JOHN SCHISEL and ALICE SCHISEL, husband and wife and the marital community composed thereof d/b/a JOHN SCHISEL CONSTRUCTION;<br><br>Respondents,<br><br>GEORGE DODDS and URSULA DODDS, husband and wife, and the marital community composed thereof, JOHN C. COFFIN, INC., a Washington corporation; JOHN C. COFFIN and JANE DOE COFFIN, husband and wife; and the marital community composed thereof; WINDERMERE REAL ESTATE/ CENTER-ISLE, INC., d/b/a WINDERMERE REAL ESTATE/ CENTER ISLE, INC., a Washington corporation; RON BODAMER and JANE DOEBODAMER, husband and wife, and the marital community composed thereof,<br><br>Defendants. | ) | No. 62492-0-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: June 15, 2009 |

Leach, J. — Stephen and Debra Crocker (Crocker) sued John and Alice Schisel (Schisel) and George and Ursula Dodds (Dodds) for personal injuries caused by the collapse of the second story railing of their residence. Schisel constructed the residence for Dodds, who sold it to Crocker. Before this sale Dodds settled a claim against Schisel for defective construction but failed to correct the defects or disclose them to Crocker. The trial court concluded that because Dodd failed to repair or disclose the defects, Schisel's alleged improper construction was not a proximate cause of Crocker's injuries and dismissed their claims against Schisel. Because Schisel's negligence is not too remote from Crocker's injuries to make those injuries a foreseeable consequence of this negligence, we reverse and remand for further proceedings. Also, Schisel's additional arguments in support of the trial court's decision are not persuasive.

FACTS

Stephen and Debra Crocker filed this action for personal injuries on May 6, 2005, alleging a claim of negligence against John and Alice Schisel, d/b/a John Schisel Construction, and claims of negligent misrepresentation and fraudulent misrepresentation against George and Alice Dodds. Because the trial court dismissed Crocker's action under CR 12(c), we must assume that the following facts alleged in Crocker's complaint are true.[1]

In 1995, Dodds contracted with Schisel to construct a two-story business and residential building in Coupeville. In 1997, Dodds sued Schisel for breach of contract and consumer protection violations, alleging significant defects in the

[1] See Reid v. Pierce County, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

construction of the building. During the course of the lawsuit, Dodds obtained a proposal to repair the second story porch railing, which Dodds alleged was unsafe. Dodds and Schisel eventually settled the lawsuit and agreed to release each other from all claims related to the construction of the building. Neither Dodds nor Schisel undertook any repairs of the porch railing.

In 2001, Dodds sold the building to Crocker. Dodds failed to disclose any defects in the building's railings. On May 7, 2002, the Crockers were severely injured when the second floor railing collapsed, causing them to fall to the ground.

On June 16, 2005, Schisel moved for judgment on the pleadings or dismissal for failure to state a claim. Schisel maintained that Dodds' failure to correct the known defect or to warn Crocker was the legal cause of the accident, not its admitted negligent construction of the railing. The trial court agreed and dismissed Schisel from the action:

> The issue here is whether the Plaintiff may sue the contractor for injuries sustained as a result of a construction defect where the Plaintiff's vendor was made aware of the defect, reached a negotiated settlement with the Contractor to repair it but neither repaired it nor disclosed it to Plaintiffs. The answer is No. The contractor's negligence may be a legal cause of Plaintiffs' injuries but it is not a proximate cause. Under the facts described in Plaintiffs' complaint, Schisel is entitled to dismissal.

The trial court later acknowledged that the negotiated settlement between Dodds and Schisel did not include any agreement to repair the railing.

The trial court denied Crocker's motion for reconsideration. This court denied discretionary review of the dismissal on February 1, 2006. On October 3, 2007, Crocker moved to vacate the dismissal, relying on the recent decision in Davis v.

Baugh Industrial Contractors, Inc.[2] Schisel argued that the dismissal was in direct conflict with Davis, in which our Supreme Court abandoned the completion and acceptance doctrine and provided for the liability of a contractor to third parties under circumstances similar to the present case. The trial court denied the motion to vacate on October 19, 2007.

Crocker eventually settled with Dodds, and the trial court entered an order of dismissal on October 17, 2008.

DECISION

Crocker contends that the trial court erred in dismissing Schisel under CR 12(c) or CR 12(b)(6). He argues that under the reasoning of the recent Supreme Court decision in Davis, Dodds' failure to remedy or warn does not automatically break the chain of causation and that it is for the trier of fact to determine whether it was reasonably foreseeable that Schisel's negligence would injure third persons.

Where, as here, "an answer is filed prior to a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6), the motion will be considered one for judgment on the pleadings pursuant to CR 12(c)."[3] In any event, motions under CR 12(c) and CR 12(b)(6) raise identical issues, and we review decisions under both provisions de novo.[4] Dismissal was not proper if Crocker can demonstrate any hypothetical facts, consistent with the complaint, that would entitle him to relief.[5]

Schisel argued—and the trial court agreed—that Schisel's negligence was not

[2] 159 Wn.2d 413, 150 P.3d 545 (2007).
[3] Blenheim v. Dawson & Hall, Ltd., 35 Wn. App. 435, 437, 667 P.2d 125 (1983).
[4] Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 634, 128 P.3d 627 (2006).
[5] See Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

the legal cause of Crocker's injury.[6] Proximate cause encompasses both cause in fact and legal cause.[7] Factual cause rests on "a physical connection between an act and an injury."[8] Legal causation involves a policy determination as to how far the consequences of a defendant's acts should extend.[9] The determination of legal causation depends on "'mixed considerations of logic, common sense, justice, policy, and precedent.'"[10] When the facts are not in dispute, the court decides legal causation as a matter of law.[11]

Schisel's challenge to legal causation rests solely on Porter v. Sadri.[12] In Porter, a home builder negligently failed to use safety glass in a stairway window. When the Healds, the first purchasers of the home, later broke the window, they considered installing safety glass but then replaced the window with nonsafety glass similar to that used by the builder. After the Healds sold the home to the Porters, Mrs. Porter was injured when she fell through the window. The Porters then sued the builder.

On appeal, the court held that the builder's negligence was too remote to constitute "a proximate or efficient legal cause" of the injury.[13] The court reasoned that although the builder's negligence might have been a cause in fact of the injury, considerations of justice and public policy precluded the imposition of liability

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[6] Schisel does not challenge any other element of Crocker's negligence claim.
[7] Gall v. McDonald Indus., 84 Wn. App. 194, 207, 926 P.2d 934 (1996).
[8] Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478, 951 P.2d 749 (1998).
[9] Schooley, 134 Wn.2d at 478.
[10] Schooley, 134 Wn.2d at 479 (quoting King v. City of Seattle, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)).
[11] Schooley, 134 Wn.2d at 478.
[12] 38 Wn. App. 174, 685 P.2d 612 (1984).
[13] Porter, 38 Wn. App. at 177.

because it was undisputed that the builder's negligence

> ceased to operate when the glass was broken and entirely removed from its frame by Healds. At that point, Heald chose to fill the opening with nonsafety glass. It was this glass that shattered and was the direct and proximate cause of Mrs. Porter's injuries.[14]

Contrary to Schisel's contention, the unusual facts of Porter are distinguishable. In determining the issue of legal causation, the Porter court relied primarily on the highly attenuated physical connection between the builder's negligence and the injury. The court twice noted that the builder's negligence "ceased to operate" once the Healds replaced the glass.[15] Here, Dodds and Schisel settled their breach of contract dispute without making any changes to the negligently constructed railing. The railing that collapsed and caused the injury was the railing that Schisel built. We do not find Porter controlling on the issue of legal causation.

Although not directly on point, we find our Supreme Court's analysis in Davis more persuasive. In Davis, the court abandoned the completion and acceptance doctrine, which relieved a contractor of liability once the owner of a project accepted the work, and adopted the modern Restatement approach, which provides for contractor liability to a third person "when it was reasonably foreseeable that a third person would be injured" as a result of the contractor's negligence.[16] The court

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[14] Porter, 38 Wn. App. at 176-77.
[15] Porter, 38 Wn. App. at 176, 177 n.3.
[16] Davis, 159 Wn.2d at 417 (citing Restatement (Second) of Torts §§ 385, 394, 396 (1965)).

noted that the completion and acceptance doctrine rested on long-abandoned privity and "last wrongdoer" rationales and on the faulty assumption that modern landowners should be able recognize defects in complex construction methods.[17]

The Davis court concluded that the completion and acceptance doctrine was harmful because it weakened the deterrent effect of tort law on negligent builders:

> By insulating contractors from liability, the completion and acceptance doctrine increases the public's exposure to injuries caused by negligent design and construction of improvements to real property and undermines the deterrent effect of tort law. Illinois long ago abandoned the doctrine specifically for this reason, stating that "[a]n underlying purpose of tort law is to provide for public safety through deterrence of negligent designers and builders. This purpose cannot be accomplished if these persons are insulated from liability simply by the act of delivery."[18]

Although Crocker's action does not expressly involve the completion and acceptance doctrine, we find the policy concerns expressed in Davis to be equally applicable to Schisel's legal causation argument. These concerns are best served by holding builders liable for the foreseeable consequences of negligent construction.[19]

Accordingly, considering the facts alleged in Crocker's complaint and all consistent hypothetical facts, we conclude that Schisel's negligence is not too remote from Crocker's injuries to support tort liability. Because the requirements of legal causation are satisfied, the trial court erred in dismissing Schisel. Whether Dodds' actions relieved Schisel from liability depends on their foreseeability.[20]

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[17] Davis, 159 Wn.2d at 417-19.

[18] Davis, 159 Wn.2d at 419-20 (quoting Johnson v. Equip. Specialists, Inc., 58 Ill. App. 3d 133, 373 N.E.2d 837, 843, 15 Ill. Dec. 491 (1978)).

[19] See Davis, 159 Wn.2d at 417.

[20] See Crowe v. Gaston, 134 Wn.2d 509, 519, 951 P.2d 1118 (1998); Davis, 159

Unlike legal cause, foreseeability is generally a question of fact.[21]

Schisel argues that the general policy favoring settlement and the specter of unlimited liability support the trial court's decision. But Schisel has not cited any authority suggesting that parties can simply contract away potential tort liability to unrelated third parties by means of a settlement agreement. Schisel's concerns about unlimited liability are tempered by other legal principles, including foreseeability, superseding causation, and contributory negligence.[22] These concerns are further tempered by Schisel's ability to address repair and indemnification issues in settlement negotiations with Dodds.

Schisel also contends that the trial court's decision should be upheld on the alternative grounds of res judicata and the statute of limitations. Neither contention is persuasive.

Schisel argues that the judgment of dismissal entered after Schisel and Dodds settled their lawsuit in 1997 bars Crocker's action under the doctrine of res judicata. Res judicata bars an action when the prior judgment has "a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made."[23] A judgment is res judicata as to every question that was properly a part of the matter in controversy, but it does not bar litigation of claims that were not in fact adjudicated.[24]

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Wn.2d at 417.

[21] Crowe, 134 Wn.2d at 520.

[22] Crowe, 134 Wn.2d at 518.

[23] Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

[24] Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 226, 588 P.2d 725 (1978).

Dodds sued Schisel in 1997 for breach of contract and Consumer Protection Act violations. Crocker's complaint alleges a claim for negligence. Although Dodds apparently alleged that the railing was defective, the record does not establish that the two actions involved substantially the same facts or involved infringement of the same rights.[25] Nor has Schisel established that Crocker's negligence action would destroy or impair the rights or interests created in the settlement agreement between Dodds and Schisel.[26] The mere fact that a defective railing was a topic in the settlement negotiations is insufficient to establish a concurrence of subject matter or cause of action for purposes of establishing res judicata.

Schisel contends that the statute of limitations on Crocker's action began to run in 1997, five years before Crocker purchased the property, when Crocker's predecessor in interest learned of the defective railing. Acknowledging that no Washington decision supports this argument, Schisel relies solely on Bradler v. Craig, a California decision involving application of the discovery rule.[27] Because Schisel fails to discuss any relevant Washington statute of limitations or Washington authority, we decline to address this issue.

The trial court's order dismissing Schisel is reversed and the matter remanded for further proceedings. Because we reverse the order of dismissal, we do not address Crocker's challenge to the orders denying reconsideration and the motion to vacate and the order granting Schisel's motion to strike.

Reversed and remanded.

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[25] See Pederson v. Potter, 103 Wn. App. 62, 72, 11 P.3d 833 (2000).
[26] See Pederson, 103 Wn. App. at 72.
[27] 274 Cal. App. 2d 466, 79 Cal. Rptr. 401 (1969).

Leach, J.

WE CONCUR:

Grosse, J.

Schindler, C.J.